



May 2015

Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights Litigation in Canada and Australia

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Recommended Citation

Ray, A. J. (2015). Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights Litigation in Canada and Australia. *The International Indigenous Policy Journal*, 6(2).

DOI: 10.18584/iipj.2015.6.2.5

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Abstract

Traditional knowledge and oral traditions history are crucial lines of evidence in Aboriginal claims litigation and alternative forms of resolution, most notably claims commissions. This article explores the ways in which these lines of evidence pose numerous challenges in terms of how and where they can be presented, who is qualified to present it, questions about whether this evidence can stand on its own, and the problems of developing appropriate measures to protect it from inappropriate use by outsiders while not unduly restricting access by the traditional owners.

Keywords

Aboriginal law, historical evidence, expert witness, Aboriginal claims

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Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights Litigation in Canada and Australia

Aboriginal rights litigation raises various questions concerning historical and traditional knowledge. The reasons are that Aboriginal title claims are based on plaintiffs' ancestors' traditional use and occupation of specific tracts of land before and after European contact. Treaty rights litigation raises similar issues, but the relevant timeframe is determined by the date when the treaty at issue was signed. In Canada, the Métis, who are of mixed European–Aboriginal descent, base their rights claims on traditional cultural practices at the time when effective sovereignty (control) was established by the British Crown, or the Canadian government. All of these instances call for information that Indigenous claimants possess as oral history and oral tradition. Use of these types of information raises several questions. How do Western courts, commissions, and tribunals deal with this sort of evidence? What protocols have they developed to accommodate traditional modes of presentation? How do they assess traditional knowledge (TK) against other lines of evidence that are introduced in claims disputes? How do they deal with issues of proprietorship? My discussion of these issues, with a focus on Australia and Canada, is intended for non-legal specialists who are not familiar with the extent to which Western courts have addressed issues that TK evidence poses.

Lines of Evidence and Knowledge

Normally courts only accept evidence from eyewitnesses because of the “hearsay rule.” This rule precludes judges from receiving evidence from individuals who have obtained it “second hand.” The problem in Aboriginal and treaty rights litigation is that the historical questions that inevitably arise call for the gathering of evidence from a time period that lies beyond the direct experiences of living people (i.e., the current generation). This fact has forced the courts to relax the hearsay rule so that they can deal with “ancient times.” In legal circles, the latter is defined as the period beyond thirty years ago. In Aboriginal and treaty rights litigation, there are two broad categories of evidence about ancient times: one is oral evidence, which is obtained mostly from Elders or those who have been designated in their societies as keepers of traditional knowledge and stories; the other category of historical information consists of an array of evidence about the past that is obtained from documentary sources or is data generated by physical and social scientists, particularly anthropologists, archaeologists, linguists, and paleontologists. Sometimes these diverse sources of evidence clash, forcing the courts to make decisions about the relative weights they should assign to the various lines of evidence when adjudicating claims.

The Challenges of Oral History and Oral Traditions

Oral evidence presented by Elders often poses the biggest challenge to the courts given that judges normally do not deal with this type of evidence, nor are they familiar with the Aboriginal protocols that are associated with it. Elders provide two types of information—oral history and oral traditions. In his classic work on this topic, *Oral Tradition As History*, Jan Vansina (1985) differentiated these two types of knowledge noting that oral histories are “reminiscences, hearsay, or eyewitness accounts about events and situations which are contemporary, that is, which occurred during the lifetime of the informants, but oral traditions are no longer contemporary. They have passed from mouth to mouth, for a period beyond the lifetime of the informants” (pp. 12 - 13). In other words, oral traditions reach beyond the

current generation. He noted that they could be transmitted in statements, as songs, and as chants. Some oral traditions are about the past, others may not be. In the Federal Court of Canada, Winona Wheeler, an expert on Plains Cree oral history who appeared on behalf of the petitioner Victor Buffalo, used the term “oral traditions history” to refer to oral traditions that deal with unwritten accounts of past events, which occurred beyond the current generation (Figure 1) (*Buffalo v. Canada*, 2005). In his extended essay on the use of oral history evidence in litigation, *Oral History on Trial*, Bruce Miller (2011) noted that the boundaries between oral history and oral tradition cannot be sharply drawn. There are many reasons for this. Of particular importance is the fact that there is such diversity in these narratives in terms of the ways that they are structured, the purposes they serve, who can relate them, and the circumstances in which they are retold (Miller, 2011).

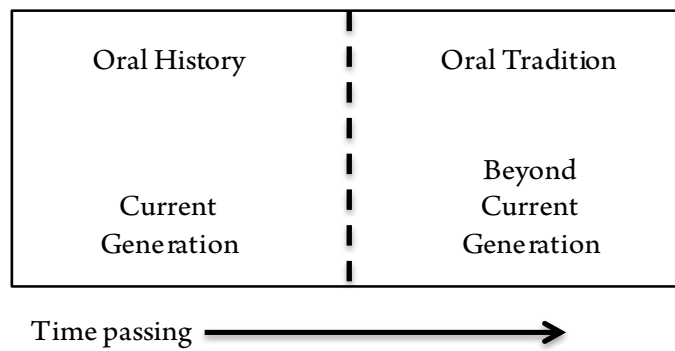


Figure 1. Relationship between oral history and oral tradition.

Keith Carlson, who has done extensive research on the Stó:lō of the Fraser Valley of British Columbia, has shown that these people had two types of oral histories. The first were personal stories, which are called *sqwelqwel* or “true news” about people. Typically, these were narratives about oneself or about someone that the individual knew personally. The broader “official histories,” which are referred to as *sxwoxwiyam*, relate myth-age transformer stories, flood stories, and origin stories (Carlson, 2010). Wheeler noted in her testimony in *Buffalo v. Canada* (2005) that the Plains Cree also have many different types of stories. One category is the family story, or family story bundle, which contain accounts of significant past events. Some of these become officially sanctioned versions that only designated family members have the authority to recount. The sanctioning process depends on the community and the cultural context. Often it is an informal process that involves reaching a general agreement in the community. In most Indigenous societies, certain individuals are designated as the carriers of official stories and they are carefully trained for that purpose. For example, among the Plains Cree of the Treaty 6 area of Alberta, Canada, communities have Treaty 6 stories that are protected by ceremony and protocols. Treaty 6 story-keepers have apprentices and the process of teaching them takes years. Very few in the community are considered official keepers or historians of Treaty 6.

Communities have various methods for verifying the accuracy of the telling of these histories. Often they accomplish this by having the keepers of the stories relate them in appropriate public settings where knowledgeable Elders can make corrections and provide commentaries. Sometimes mnemonic devices

are used as memory prompts. The winter counts of the Plains tribes of North America are probably one of the best-known examples. In these counts, key events from a series of years are represented pictorially. The landscape is also an important memory prompt. Many stories are tied to place and can only be told in their entirety at the appropriate location. In contrast to “official histories,” those of a more personal nature are not normally subject to the same scrutiny by other members of the local native community.

Oral tradition evidence differs from that of oral history, although the boundary is not sharp, in that it primarily is concerned with transmitting information about cultural practices from one generation to another. As with oral histories, the mode of transmission can be by apprenticing and through storytelling, chanting, singing, and/or performances. Of relevance to Aboriginal claims, oral traditions are a key source of Indigenous information about economic, cultural, and spiritual land use practices. In many Aboriginal societies, some traditional knowledge is not shared universally. Rather, specialized knowledge can only be shared among those of the same gender, or among members of a particular social group.

These aspects of oral traditions can pose significant challenges for claims adjudication procedures and for the Aboriginal witnesses who are involved. For example, problems of gender-specific knowledge arose in land claims in northern Australia in the 1970s and 1980s. In 1976, Australia passed the *Aboriginal Land Rights (Northern Territory) Act (1976)*, which established a Land Claim Commission to adjudicate the land claims of Aborigines in the Northern Territory. In these societies, local patrilineages had strong ties to the land through a series of sacred sites and dreaming tracks. Adult men and women are carriers of sacred and special knowledge, which they were barred by tradition from sharing with members of the opposite sex. From the outset, the first Northern Territory Land Claim Commissioner, Justice John Toohey (1982), understood that this cultural reality would have major implications for receiving evidence in claims hearings:

The question of material of a secret and sacred nature should be seen in perspective. For the most part claimants, men and women, are content to present the evidence in support of their claims without seeking to impose any restrictions upon it. Where they do feel obliged to take this course they should be permitted to do so so long as it does not unduly prejudice others participating in the inquiry. There are competing interests to be weighed. I do not think claimants should feel obliged to speak of matters they regard as secret. On the other hand it would be unreal to deny the impact that witnessing aspects of ritual and ceremonial life has in establishing traditional ownership and traditional attachment to land. (p. 88)

In other words, Toohey weighed the concerns of Aborigines as dictated by their cultural traditions against the general “rules of natural justice as they have developed in regard to administrative enquiries, which dictate that those participating in an inquiry ought to be given the opportunity to dispute testimony and make comments about it” (Toohey, 1982, p. 88).

In the end, Justice Toohey decided to accept some evidence on the basis that only a limited number or class of people would have access to it. As it happened, this did not prove to be a major problem because the greatest part of the sensitive evidence concerned men’s knowledge and most of the legal counselors were male. In the key exception that Justice Toohey dealt with regarding secret women’s ceremonies, the claimant women were willing to let the commissioner, female counsel, and female anthropologists read the reports about the ceremonies in question (Toohey, 1982). The issue of the gendered nature of

TK came to the fore in land claims in Australia beyond the Northern Territory beginning in the early 1990s. Most notably, perhaps, was the Hindmarsh Island claim that was put forward in 1994 by a group of Ngarrindjeri female Elders from Goolwa, South Australia. They opposed the building of a new bridge in the Murray River delta area on the basis that it would interfere with traditional religious practices, in particular “secret women’s business” that took place on the island. Their claim, which became the subject of the Hindmarsh Island Royal Commission (1996) and civil litigation, was remarkable not only because it focused on questions about women’s links to the land, but the secret nature of the practices served to raise questions among proponents of the project and another group of Ngarrindjeri women about whether the traditions asserted were fabrications (Gelder & Jacobs, 1997).

In Canada, problems also have arisen concerning telling oral histories and relating oral traditions in the public forum of the courtroom. *Delgamuukw v. British Columbia* (1997) was the landmark title suit of the Gitksan-Wet’suet’en of north-central British Columbia. At trial in the Supreme Court of British Columbia (1987-1991), the Gitksan-Wet’suet’en presented evidence that showed that they had divided their traditional homelands into house territories. Houses were the residences of local lineages (an extended kinship group). Thus, the “house” simultaneously refers to a dwelling and a landowning kinship group. A hereditary chief served as the custodian and manager of a house territory. Each house kept a “box” of traditional knowledge about its history, rights, and customs. This knowledge is known the *Kungax* amongst the Gitksan and the *Ada’ox* amongst the Wet’suet’en. Elders only “opened their boxes” in the appropriate setting of a longhouse. Typically, they did not share their knowledge with outsiders. For the Gitksan and Wet’suet’en, this practice meant that they had to make the painful decision to share their *Kungax* and *Ada’ox* with outsiders in the alien setting of the courtroom in order to take their claim to court. It also meant their traditional stories and knowledge would be subject to evaluation procedures that would be foreign and painful to them. In particular, the adversarial approach for the testing of evidence that is practiced in Western courts meant that the hereditary Elders would be subjected to harsh cross-examination. This procedure does not afford the Elders the respect that they are accustomed to receiving in their own societies. In many Aboriginal societies, Elders are not interrupted, questioned, or “directed.” In court and commission hearings, this often meant that Elders’ testimony did not seem to be directly relevant to the questions they were asked. As anthropologist Nancy Lurie observed many years ago with respect to United States Indian Claims Commission (1946 - 1978) hearings, the tendency of Elders to “wander off point” was one of the reasons commissioners preferred to deal with anthropologists as surrogates for Indian witnesses. Anthropologists were accustomed to providing direct responses to questions.

Protocols for Presentation

Introducing oral histories and traditions in litigation proceedings has raised additional problems for courts, commissions, tribunals, and Indigenous witnesses. During the trial of *Delgamuukw*, Chief Justice of the Supreme Court of British Columbia, Alan McEachern, made a brief visit to the plaintiffs’ territories and he opened the trial in May 1987 in a nearby courthouse in Smithers, British Columbia. Soon, he found the location inconvenient and he relocated the proceedings to Courtroom 53 of the British Columbia Supreme Court at the concrete and glass Law Courts Building in Vancouver. This location was a three-hour flight from the rural, largely forested lands of the Elders’ traditional territories. The distance and high cost of flying meant that very few members of their community were ever present to lend moral support and bear witness to their Elders’ testimony and cross-examination. For these

reasons, appearing in Courtroom 53 proved to be an extremely stressful, even debilitating experience, for many of the more elderly witnesses.

Since *Delgamuukw v. Regina* (McEachern, 1991), Canadian courts have taken steps to address this problem. These steps were taken in *Buffalo v. Canada* (2005), which was a lawsuit that the Samson Cree First Nation of Alberta, Canada filed in the Federal Court of Canada against the federal government for alleged breach of fiduciary responsibilities toward them arising from Treaty 6 (1876). In this instance, Federal Court Justice Max Teitelbaum temporarily relocated the hearings from the courtroom in Calgary, Alberta to the Samson Cree reserve for the presentation of the Elder's testimony. This venue provided a more comfortable and familiar environment for the Elders to present their testimony. Nonetheless, they were subject to normal court proceedings for the testing of evidence. When the trial resumed back in Calgary, Justice Teitelbaum sought to further accommodate the Cree by allowing them to offer an opening prayer and place a sweetgrass bundle in the courtroom.

In taking these small steps, Justice Teitelbaum unknowingly was following a precedent set over two decades earlier by Land Claims Commissioner Justice Toohey (1979) in the Northern Territory of Australia. As commissioner, Toohey, who was also a member of the Supreme Court of the Northern Territory, was expected to rigorously test the evidence that he received in public hearings. Accordingly, he applied many standard litigation procedures. Quickly, however, Toohey also decided to hold his hearings both in the formal settings of the courtrooms in Darwin and other towns in the Northern Territory, in the communities of the plaintiffs, and sometimes at sacred sites and other special places. He met at the latter places because some stories and certain ceremonies could only be told or performed at appropriate locations.

Toohey relaxed proceedings in other ways. He allowed groups of Aborigines to provide testimonials via videotapes so that more witnesses could be heard in a reasonable length of time. However, this approach precluded lawyers from cross-examining the witnesses who appeared using this format (Toohey, 1979). Also, during the public meetings that he held in the Aborigines' communities, Toohey allowed those present to prompt and correct each other and thereby reach consensus on important points. Normally, in court proceedings such practices would be regarded as leading a witness and would not be tolerated. It was in these ways that Toohey had relaxed the rules of evidence considerably to accommodate Aborigines' traditional ways of transmitting and verifying traditional knowledge. He believed he was able to get closer to the "truth" by doing so.

To date, Canadian courts have not been willing to accommodate traditional Western practices of testing evidence to this extent, but they are making efforts toward that end. For example, the Federal Court–Aboriginal Law Bar Liaison Committee (2009) developed practice guidelines that were intended to make the Federal Court more "user friendly" for Aboriginal litigants. The guideline, adopted by the court, addressed a wide range of issues. It recommended that portions of trials ought to be held in Aboriginal communities and that the courts accommodate appropriate traditional ceremonies (Federal Court–Aboriginal Law Bar Liaison Committee, 2009). The same committee has drafted a discussion paper dealing with most aspects of Elder testimony.

An additional problem the courts face when dealing with oral history and traditional knowledge relates to the manner of presentation. Sometimes the tellers are supposed to deliver their stories in chants,

songs or other performances wearing appropriate regalia. Some of the *Kungax* and *Ada'ox* of the Gitksan and Wet'suet'en, for example, are supposed to be presented as chants. When Elders attempted to do so in *Delgamuukw v. Regina*, British Columbia Supreme Court Chief Justice Alan McEachern objected, saying that chanting violated the decorum of the court. As I discussed in *Telling It To the Judge*, a similar issue arose several years later during a Métis fishing rights trial in Saskatchewan in 2007 (Ray, 2012). In this instance, the centrality of fiddle music to Métis culture was an issue at trial. Accordingly, the lawyers for the defendants called expert Métis fiddler Oliver Boulette to testify. When he proposed to play some key Métis songs on his fiddle, the lawyer for the Crown objected strenuously. He stressed that "this is a court of law, we're here to deal with legal issues, it's not a concert" (Ray, 2012, p. 116). The judge overruled the Crown's objection. In October 2012, the Federal Court–Aboriginal Law Bar Liaison Committee (2012) issued revised Aboriginal Litigation Practice Guidelines that addressed most of these issues.¹ The committee emphasized that:

Reconciliation requires the courts to find ways of making its rules of procedure relevant to the Aboriginal perspective without losing sight of the principles of fairness, truth-seeking and justice. This can be accomplished by adopting an approach rooted in respect and dignity. One way to show respect and enable Aboriginal witnesses to be heard is to have regard for Aboriginal ceremony and protocols. (p. 11)

In making this observation, the Liaison Committee noted that Aboriginal ceremonies may be part of the process of presenting oral history and evidence.

Evidentiary Boundaries are Blurred

Before discussing the ways courts assess oral evidence about Aboriginal history and traditions, and other lines of evidence, it is important to note that the boundaries between them are not as distinct as the courts often seem to imagine. For instance, oral histories and eyewitness evidence can be included within an archival document. The reason is that the latter sources often include information that Native people provided to European traders and explorers. A notable example is the narrative of 18th century trader and explorer David Thompson. In 1797, he provided an account of the earlier separation of the Siouan-speaking Assiniboine from their Yankton relatives in the northern area of present-day Minnesota. Thompson had obtained his historical account of this important incident from a Native Elder (cited in Glover, 1962). In other words, Thompson's written narrative contains this and other snippets of oral tradition histories as well as eyewitness accounts of his travels and interactions with various Aboriginal groups.

As the Hudson's Bay Company expanded its trading empire across the continent, beginning in 1670, most of the information it obtained about areas that lay beyond the range of its posts and the travels of its servants was obtained by post managers interviewing their Native customers. One of the most important examples is found in the Hudson's Bay Company records for Fort Kilmaurs (Old Fort Babine), which had been established on the northern shores of Babine Lake, British Columbia on the edge of Gitksan-Wet'suet'en territory. In his district report for 1822 to 1823, Brown described the social

¹ In September 2011, the Federal Court–Aboriginal Law Bar Liaison Committee issued a discussion paper entitled: *Elder Testimony and Oral History*, which addressed most of these issues (see Federal Court–Aboriginal Law Bar Liaison Committee, 2012).

structure of the Wet'suet'en in accurate detail even though he had not yet visited their territory. There is little doubt that he would have obtained this information from a local Native informant, who likely was from the Wet'suet'en's principal village that lay over the mountains to the west in the Bulkley Valley. The information in Brown's reports provided independent corroboration of the oral testimony of the Elders in *Delgamuukw v. Regina* (Ray, 2012).²

After the company established a post in an area, its officers and servants did not remain resident "outsiders." Rather, usually they married into the local population "à la façon du pays." They did so partly because these "country marriages" served to cement trading relationships with First Nations according to Aboriginal customs. They also had the effect of making insider-outsider distinctions of dubious merit. For example, Hudson Bay Company Chief Factor James Isham wrote one of the first "amateur" ethnographies about First Nations of the Canadian central Subarctic. He was in charge of York Factory during the early 18th century when it served as the company's chief gateway to the interior of present-day central Canada. In his *Observations on Hudson Bay* (from 1743 – 1749), Isham (1743/1949) provided a wealth of information on all aspects of Cree life and culture. In his capacity as a Hudson's Bay Company officer, he had the viewpoint of a European outsider; as the spouse of a Cree woman and the father of her children, he also had an "insider's" perspective (see Figure 2).

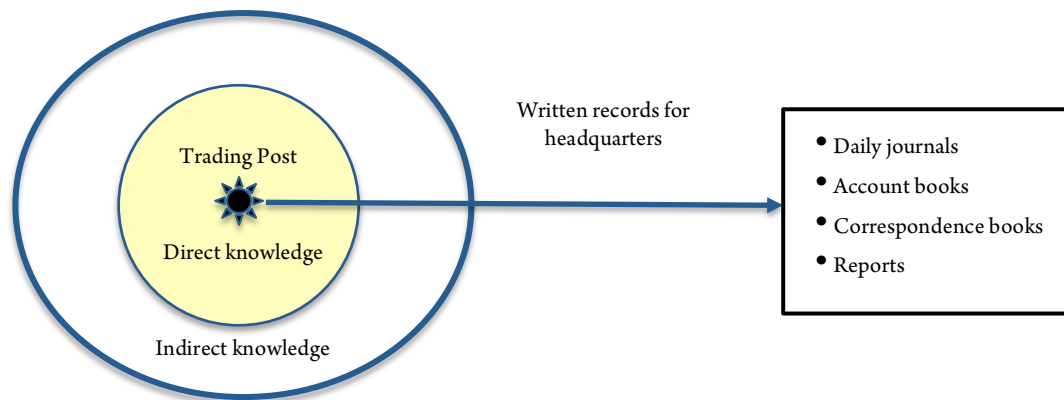


Figure 2. Nature of Hudson's Bay Company data collection and transmission during expansion.

Archaeological data provides yet another example of how the boundaries between the different lines of evidence can be blurred. Physical artifacts are given meaning in terms of current anthropological theoretical models and through methodologies used for interpretation. Ethnographic analogy and the so-called "direct historical approach," are two key ways archaeologists give meaning to excavated artifacts. The former involves ascribing behavior to an assemblage of artifacts based on the similarity of the latter to an assemblage associated with historical cultures elsewhere. Our knowledge of the latter usually is based partly, if not largely, on ethnography, which entails making field observations and conducting oral interviews with Indigenous people. The "direct historical approach," on the other hand, involves reading the archaeological record of a particular place backward in time from the documented

² I edited and reproduced these reports in *Telling It To the Judge: Taking Native History To Court* (Ray, 2012, see pp. 161 – 202).

historical period to the pre-contact (pre-recorded history) era. In other words, it entails using documentary records.

Weighing the Evidence and Ways of Knowing

Once oral histories and traditional knowledge are entered as evidence, claims commissioners and trial judges face the difficult task of deciding how much weight they should give this information when reaching their decisions. In the land claims cases of the Northern Territory of Australia during the late 1970s and 1980s, TK was the primary evidence and often there was no contrary data of significance that the commissioner had to consider against it. The problem of competing evidence subsequently did arise elsewhere in Australia, however, after Murray Islanders and Aborigines took their land claims to court. These problems escalated after the landmark Murray Islanders' title claim, *Mabo v. Queensland (No 2)* (1992), when the High Court of Australia recognized Aboriginal title for the first time, but also ruled that the state could extinguish it without paying compensation. This decision led the federal government to pass the *Native Land Title Act* (1993), which created the Native Title Tribunal to adjudicate claims nationally. In 1998, Parliament amended the Act and added a clause that detailed how the federal courts were supposed to weigh Aboriginal evidence. The clause stipulated: "In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings" (Government of Australia, 1998, 82.2) This amendment was the federal government's specific response to the land title case of the *Wik Peoples v. Queensland* (1996). In this litigation, the High Court determined that pastoral leases on Crown land, which take up almost half of the country, do not extinguish Native title. Of particular relevance here, the amendment of 1998 reflected federal politicians' fear that the courts' efforts to accommodate Aborigines' perspectives were becoming prejudicial to the interests of other Australians. So, the revised legislation specified that evidence pertaining to Aborigines use and occupation of land had to be considered in relation to information about the historical land use of other local stakeholders. This development serves to highlight the reality that courts face real constraints when attempting to accommodate Aboriginal traditions without provoking a strong political backlash from the dominant settler society.

The first land claims ruling of the High Court of Australia following the revisions to the *Native Title Act* was that of the Yorta Yorta people who live along the Goulburn and Murray rivers in the northeastern area of the state of Victoria. The trial of this claim had taken place in the Federal Court on the eve of the passage of the revised Act, but the trial judge allowed interested parties to make post-trial submissions that addressed the changes. At trial, the petitioners had the burden of proving that at least some of their named ancestors had occupied the claimed territory prior to 1788 and that one or more members of the claimant group were descended from such ancestors. The petitioners placed heavy reliance on oral and anthropological testimony. They and the respondents also introduced extensive documentary evidence. The trial judge found considerable problems with all of these lines of evidence (*Yorta Yorta Aboriginal Community v. Victoria & Ors*, 1998). Regarding oral history, he concluded that some of the Aboriginal witnesses were not reliable. Complicating matters, opposing anthropological experts put forward conflicting interpretations of the ethnographic information that was contained in oral and written sources. The trial judge concluded that he lacked the expertise to resolve their differences. Regarding some of the key historical documents pertaining to the early nineteenth century, the trial judge noted that these records did not directly address the key issues before his court. Consequently, he thought that

the testimony of experts who had relied on these records was speculative. In the end, the trial judge put more weight on the documentary records and dismissed the claim. In upholding his decision, the High Court concluded that the Aboriginal claimants' ties to the land had been broken by "the tides of history" (*Yorta Yorta Aboriginal Community v. Victoria*, 2002).

In Canada, the problem of weighing Aboriginal oral history and TK evidence against other kinds of knowledge came to the public's attention in the late 1990s. The issue arose in an important Aboriginal fishing case in British Columbia remembered as *Regina v. Van der Peet* (1996). This involved the Stó:lō of the Fraser River who contended that they held an Aboriginal right to operate a commercial salmon fishery. At trial, the presiding judge had to consider an array of cultural and historical evidence. He downplayed the oral evidence. On appeal, the Supreme Court of Canada warned:

A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in . . . The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts. (*Regina v. Van der Peet*, 1996, The Aboriginal right section, para. 9)

It was the *Delgamuukw* trial that captured the public's attention about this issue. In this trial, the plaintiffs and the Crown confronted Justice McEachern with a massive amount of archaeological, cartographic, ethnographic, geological, genealogical, geographical, historical, and historical geographical evidence in addition to the many months of testimony that he received from the Elders. In the end, Justice McEachern gave little weight to the latter's testimony, which led him to reject their claim. His decision was appealed to the Supreme Court of Canada. The latter court faulted him for not giving the traditional oral evidence proper weight and ordered a new trial. Regarding oral evidence, the Supreme Court stated:

The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title.

Continuing to fault Justice McEachern, the Supreme Court added:

The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership." Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different. (*Delgamuukw v. British Columbia*, 1997, The ability of the court to interfere with the trial judge's factual findings section, para. 1)

Rather than settle the issue of oral evidence, *Delgamuukw* merely intensified the battles in the Canadian courts about this line of evidence. The results have been mixed as two relatively recent examples serve to illustrate. One was the massive trial of Chief Victor Buffalo, which dealt with the treaty rights claim of the Samson Cree of Alberta, Canada (*Buffalo v. Canada*, 2005). After the Elders had testified in this trial,

the plaintiffs and the Crown called experts to give their opinions about the nature of traditional oral evidence including its strengths and weaknesses. Winona Wheeler appeared for the plaintiffs and she emphasized the positive aspects of this line of evidence. Archaeologist Alexander von Gernet testified on behalf of the Crown. He asserted that, notwithstanding the Supreme Court's *Delgamuukw* ruling, oral evidence cannot stand alone. According to von Gernet, it must be corroborated with other lines of evidence and by using approaches to evidence commonly applied in the social sciences.

In the end, Justice Teitelbaum discounted the many months of oral testimony by the Elders and put forward a long rationale for doing so in the reasons for his judgment. He began with a review of the Supreme Court's Van der Peet and Delgamuukw decisions and the subsequent Supreme Court ruling in *Mitchell v. M.N.R.* (2001), as they related to this topic. Teitelbaum observed:

The SCC's [Supreme Court of Canada] decision in *Delgamuukw*, supra, does not mandate blanket admissibility of oral history or oral tradition evidence; nor does it establish the amount of weight that should be placed upon such evidence by a trial judge. The decision merely speaks of "due weight." This does not amount to equal weight, an interpretation which the plaintiffs seem to suggest.

He continued:

In *Mitchell*, supra, McLachlin C.J. held that "due weight" meant that oral tradition evidence is entitled to "equal and due treatment." It should neither be undervalued, nor artificially constrained to carry more weight than it could reasonably support. (*Buffalo v. Canada*, 2005, para. 451)

Justice Teitelbaum then turned his attention to the main points of Wheeler's testimony about nature of Cree "oral history traditions." He noted that she had faulted historians for treating oral history as though it was like any other documentary source, which entailed sifting the stories for facts while stripping them of any of their mythical aspects and disregarding their original intent and cultural context. Justice Teitelbaum recalled Wheeler saying that Cree histories "distorted time," when viewed from a Western perspective because the Cree conception of time was constructed in terms of "spirals in an unbroken chain, linking past, present, and future together." He noted that Wheeler had added that to understand how Cree viewed time it was necessary to have an intimate knowledge of the local land and environment because they determined time by linking it to season and climate (*Buffalo v. Canada*, 2005, para. 306).

On the crucial issue of verification, Justice Teitelbaum recorded that:

She believed that verification must occur within the context of the oral tradition histories; one must be aware of the internal checks and balances within the cultural context. Foremost, however is the storyteller's reputation. Elders are held in high esteem and are expected to be truthful. Elders may assist each other in ensuring that a proper rendition of a story is given. Repercussions result also from any break in protocol. (*Buffalo v. Canada*, 2005, para. 301)

In light of her testimony, Justice Teitelbaum asked Wheeler how the court should evaluate Cree oral evidence. She replied:

Somebody trained in oral histories research can provide you with the interpretation, the full contextual reading you require to see the transcript beyond a literal reading . . . The transcript is a representation of the original full story, and to get a full understanding of the meaning, we have to go back there. And that's what the local experts, I guess, who are not considered experts by the Court—they are the key. They are the ones that I go to for assistance to help me understand transcripts and oral histories that have been taped. So the local experts are in the best position to do that, because they can provide the context I need to be able to read that document more completely and more fully. (*Buffalo v. Canada*, 2005, para. 311)

Von Gernet, who testified after Wheeler, put forward the view that oral histories were merely “oral documents.” Based on this outlook, he provided the judge with a much simpler approach that did not require the court to take into account cultural differences nor turn to Aboriginal experts for help when analyzing and interpreting this source. Justice Teitelbaum wrote:

With regard to his methodology, Dr. Von Gernet testified that other versions of an oral tradition by the same informant allow for testing of internal consistency and range of variability. These versions can also be compared with traditions told by other storytellers about the same historical events. The final step involves looking for independent evidence and assessing it against the oral tradition. He testified that he would also look for evidence of feedback—subtle influences from the written record—as well as conflation. (*Buffalo v. Canada*, 2005, para. 314)

In the end, Justice Teitelbaum thought that Wheeler's recommended approach of going back to the Elders for guidance was impractical for a court. He explained that Wheeler's approach might well be suitable for scholars, but:

It is simply not feasible, nor is it realistic, for a trial judge. The Court cannot embark upon independent fact-finding investigations into evidence tendered at trial. The Court must rely upon the parties for the evidence and any assistance from experts. And while Dr. Wheeler offered some interesting insights into the nature of oral traditions and oral histories, she did not present the Court with any analysis of the oral traditions tendered at trial. (*Buffalo v. Canada*, 2005, para. 453)

From 2002 to 2007, another massive trial took place in the Supreme Court of British Columbia. This involved the land title suit of *Tsilhqot'in Nation v. British Columbia* (2007). It unfolded in 339 trial days that were spread over seven years in Victoria and Tsilhqot'in territory. As in *Delgamuukw* and *Victor Buffalo*, the trial judge had to confront massive amounts of diverse cultural and historical evidence. Once again, a central issue concerned the weight the court should give to oral tradition. Yet again, Von Gernet appeared for the Crown. He presented two briefs. The first was his general assessment of oral history as a line of evidence. The second report specifically evaluated *Tsilhqot'in* oral history. Based on his reading of the first brief, Justice Vickers concluded that Von Gernet held that oral history evidence could never stand on its own. Justice Vickers flatly rejected this presumption. In his reasons for judgment the Justice Vickers wrote:

I was left with the impression that Von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. (*Tsilhqot'in Nation v. British Columbia*, 2007, para 154)

Justice Vickers pointed out that Von Gernet's methodology flew in the face of the jurisprudence that had developed in Canada since *Delgamuukw*:

This approach is not legally sound. Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Von Gernet, it would fall into legal error on the strength of the current jurisprudence. (*Tsilhqot'in Nation v. British Columbia*, 2007, para. 154)

Justice Vickers thought that Von Gernet's basic attitude toward oral history undermined the credibility of his assessment of *Tsilhqot'in* oral histories of events relevant to their claims. In this way, Justice Vickers judgment reflected changes that had taken place in Canadian jurisprudence about oral history evidence since Teitelbaum's ruling.

Issues of the Proprietorship of TK

Given the importance of TK (broadly defined) in litigation and its centrality to the maintenance of Aboriginal cultures, it is inevitable that proprietorship issues arose from the outset. This can best be illustrated by returning to the work of the Northern Territory Land Commission. As noted, in Aborigines' societies, classes of people (adult men and women) held exclusive rights to certain stories, ritual secrets, and practices, artifacts, and regalia. Out of respect for this customary practice, from the outset, Toohey restricted access to this type of material. In 1985, one of his successors, Justice J. Maurice, placed restrictions on exhibits and sections of the transcripts regarding the Waramungu peoples' land claim (Neate, 1989).

In 1987, the federal government amended the Land Rights Act (Northern Territory) to give the Commissioner the specific authority to prohibit or limit the access to and/or publication of material provided to the commission under the Act. These revisions also empowered him or her to bar specific persons or classes of persons from being in the vicinity of the place where information is to be given in the course of a traditional land claim hearing (Neate, 1989). The amendments to the Act gave the Land Commissioner the right to make a number other restrictions on submitted materials based on the form of presentation and the conditions under which it had been tendered. These are summarized in Table 1.

Table 1. Restrictions on the Dissemination of evidence presented to the Land Rights Commission of the Northern Territory after 1987

Form	Conditions of Submission	Access Restrictions
Tape recording and transcription	Tendered as restricted exhibit	Available only to those present when evidence was given
Oral testimony summarized in writing	Tendered as restricted exhibit	Available only to those present when evidence was given
Written notes	Given to those present on the condition that it not be marked as an exhibit	Be returned to the claimants before the conclusion of the hearing
Oral submission not recorded in anyway	Tendered in secret session	Only referred to in general terms by counsel in final addresses and by the Commissioner in his or her report
Videotape (with or without a transcript)	Prepared outside the hearing of a claim hearing showing meetings of claimants or claimants at sites speaking about them	Restrictions on who can view the tapes and/or read transcript
Sound recordings of ceremonial singing, etc.	Tendered as restricted exhibit	Available to a restricted group of listeners
Diagrams (of ceremonial grounds, etc.)	Tendered as restricted exhibit	Available for viewing to a restricted group
Photographs (of ceremonies, etc.)	Tendered as restricted exhibit	Available for viewing to a restricted group
Reports on direct observation of ceremonies	Tendered as restricted exhibit	Available to be read by a restricted group
Evidence given solely to the Commissioner	Tendered as restricted exhibit	Restricted

Note. Source: Neate (1989).

Although these measures were intended for the benefit of the Aborigines who took part in land claims hearings, subsequently it has created problems for them and for the Federal Court that has to administer the land claims records, including the restricted reports. According to Australian anthropologist Nicolas Peterson, who was a participant in some of the early hearings, lawyers for land claimants played the politics of knowledge hard and, in the end, most of them argued for restricting all of the documentation, including the claim books. Today, only the transcripts are readily available. The irony is that originally

the Northern and Central Land Councils, which represented claimants, sold copies of these books to people. The books had nothing restricted in them and do not include sensitive genealogies, which were presented in separate bound books. After a few years of selling the claims books, the councils stopped doing so and eventually these documents also became restricted. The irony in this, according to Peterson, is that Aboriginal people now want access to these claims books as they are a repository of a good deal of their cultural history that is otherwise unknown or not available to them. Gaining access is not an easy process, however, and will prove to be a drawn out effort (Nicolas Peterson, personal communication, July 21, 2012). In Canada, the superior courts can seal sensitive material in a file, making it inaccessible to the public. Also, the Federal Court can bar the use of traditional knowledge by those who are not members of the aboriginal group who provided it.

Conclusion

Traditional knowledge and oral traditions history are crucial lines of evidence in Aboriginal claims litigation and alternative forms of resolution, most notably claims commissions. These lines of evidence pose numerous challenges in terms of how and where they can be presented, regarding who is qualified to present it, concerning the question of whether this evidence can stand on its own, and developing appropriate measures to protect it from inappropriate use by outsiders while not unduly restricting access by the traditional owners. Given that the Land Claims Commission of the Northern Territory of Australia, Australian courts, and Canadian courts have struggled with these issues since the 1970s due to the complexity of the issues, which are compounded by the cultural diversity of Aboriginal peoples, makes it unlikely that final resolutions will be reached. Rather, ongoing dialogues involving commissions and courts and Aboriginal people will be required and case-by-case solutions needed.

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